No. 18-18

IN THE
Supreme Court of the United States

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION,
Petitioner,

v.

AMERICAN HUMANIST ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

Respondents urge this Court to permit the removal or destruction of a cherished war memorial that has stood without controversy for nearly a century. And far from calling the decision compelling that result a one-off—or contending, as the petition does, that *two* federal circuits would reach the same startling conclusion, *see* Pet. 21-25—respondents assert that "*[e]very*" federal court agrees that "a government cross monument displayed as a memorial" is "unconstitutional." Opp. 20 (emphasis added).

There is thus little dispute about what is at stake in this case. Unless this Court intervenes, a centerpiece of one county's civic life will be mutilated or torn down. *See* Amicus Br. of Maryland Elected Officials 4-5. Memorial crosses across the country—which, by the States' count, number well into the hundreds—will face a similar threat of destruction. Amicus Br. of West Virginia *et al.* 12-27. And the Nations' veterans will need to endure ever-more-determined efforts to "purge from the public sphere" every remembrance of their sacrifice that "in any way partakes of the religious." *Van Orden* v. *Perry*, 545 U.S. 677, 699 (2005) (Breyer, J., concurring in the judgment).

The Establishment Clause does not compel these senseless results. The Peace Cross easily satisfies the Constitution's call for religious neutrality. The mere inclusion of a cross does not render a monument unconstitutional. And no purpose would be served by respondents' request that the Court wait any longer to say so. The writ should be granted, and the Fourth Circuit's gravely incorrect decision should be reversed.

ARGUMENT

I. RESPONDENTS CANNOT DEFEND THE FOURTH CIRCUIT'S DECISION.

The Fourth Circuit held that the Peace Cross must be removed or destroyed solely because it bears the shape of a cross. The panel could not muster a convincing basis for that implausible conclusion, and, despite filing two briefs spanning 88 pages, neither can respondents.

1. Respondents make remarkably little effort to grapple with the extensive evidence of the Peace Cross's secular meaning. Respondents do not once acknowledge that the memorial contains an explicit dedication honoring the 49 servicemen who perished in World War I. They make only passing mention of the memorial's placement in a park filled with other secular veterans' memorials. *See* Opp. 41. And they make no attempt to rebut the overwhelming evidence, powerfully reinforced by amici, that the Latin cross has long been recognized as a nonsectarian symbol of the World War I dead. *See* Amicus Br. of Veterans of Foreign Wars 7-17; Amicus Br. of Retired Generals and Flag Officers 8-14.

Instead, respondents focus their attention on minutiae plucked misleadingly from the historical record. Respondents assert that the memorial was "[o]riginally called the 'Calvary Cross.'" Opp. 2. It was not: Respondents' support for that claim consists of announcements in two newspapers from 1919 that used that term in passing. Opp. 6 nn.12-13. Most descriptions of the monument prior to and contemporaneous with its construction—let alone in the 93 years since—used entirely nonreligious language. *See, e.g.*, C.A. JA 1128, 1139, 2302-03, 2309.

Respondents further assert that "every ceremony held for the Cross" has included "Christian clergy-led prayers." Opp. 7. What respondents are referring to are the *invocations and benedictions* that precede many Memorial Day and Veterans Day ceremonies at the Peace Cross. *See* Pet. App. 60a-62a. This Court has repeatedly held that solemnizing prayers of this kind are constitutional. *See Town of Greece* v. *Galloway*, 134 S. Ct. 1811, 1818-19 (2014). Certainly

they do not tar any nearby structure as a religious establishment.

Respondents also offer an array of outright misstatements. They claim that the Commission did not acquire the cross to "address traffic safety concerns"; the Fourth Circuit expressly found that it did. Pet. App. 19a. They question whether the star in the center of the memorial is the American Legion symbol; respondents' own expert conceded that it is. C.A. JA 287. Respondents repeat the "simply wrong" contention that there is some connection between the Peace Cross and the Ku Klux Klan. Pet. App. 62a n.5. Most egregiously, respondents assert that it is "*undisputed* that the Bladensburg Cross does not honor non-Christian veterans." Opp. 4 (emphasis added). Of course that is not "undisputed": As the record amply demonstrates, for 93 years the community has understood the Peace Cross as a memorial to veterans and the fallen of every faith, C.A. JA 1892, a fact attested to by the diverse amici supporting its preservation here, *see* Amicus Br. of Jewish Coalition for Religious Liberty; Amicus Br. of Islam & Religious Freedom Action Team.

2. Respondents' argument, like the Fourth Circuit's, thus boils down to the contention that a cross-shaped memorial is necessarily unconstitutional, regardless of any amount of secular history or context. In respondents' view, a Latin cross does not "symbolize[] *anything* other than Christianity," and thus "a 'memorial cross'"—any memorial cross—"*only* 'memorializes the death of a Christian.'" Opp. 15, 21 (emphases added; citations omitted).

That sort of categorical hostility to religious symbols finds no footing in this Court's Establishment

Clause jurisprudence. The Court has repeatedly upheld secular monuments that use symbols with religious associations at least as strong as the cross, including the crèche, the menorah, and the Ten Commandments. Pet. 13. Moreover, in *Buono*, a plurality of this Court specifically chastised lower courts for holding—in words that could have been taken from respondents' brief—that a Latin cross is "merely a reaffirmation of Christian beliefs" when used to honor the World War I dead. *Salazar* v. *Buono*, 559 U.S. 700, 721 (2010).

Respondents make token efforts to distinguish these precedents, but their real quarrel is with the precedents themselves. They assert that *Lynch* upheld the use of a crèche because it served as "a symbol of a secularized holiday." Opp. 34-35. No; the Court *rejected* the proposition that the crèche and the Christmas holiday have lost their religious associations, and upheld the display of a symbol "identified with one religious faith" as a permissible way of "taking official note of *** our religious heritage." *Lynch* v. *Donnelly*, 465 U.S. 668, 685-686 (1984).

Respondents claim that *Buono* is distinguishable because the memorial in that case lacked any "government imprimatur." Opp. 37. Again, just the opposite. The *Buono* plurality *emphasized* the substantial role that Congress played in "giving recognition to" and preserving the monument. 559 U.S. at 716, 720-721. Its point was that the memorial did not "set the imprimatur of the state *on a particular creed*" because it was "intended simply to honor our Nation's fallen soldiers." *Id.* at 715 (emphasis added). So too here.

Respondents' efforts to distinguish *Van Orden* are particularly unconvincing. Every consideration on which Justice Breyer relied in upholding the Ten Commandments monument applies with equal if not greater force here. Pet. 15-16. Respondents suggest that *Van Orden* can be distinguished on the grounds that the Peace Cross has "a long history of 'religious use and symbolism'" and the surrounding memorials were added by "the government" at different times and were different sizes. Opp. 41. Those are not distinctions at all. As noted above, the Peace Cross has no "long history of 'religious use and symbolism,'" and in any event the religious associations of the Ten Commandments obviously predate the Latin cross. Furthermore, the surrounding displays on the Texas State Capitol grounds were added by the government, and at different times and in varying sizes, too. *See Van Orden*, 545 U.S. at 702.

II. THE DECISION BELOW DEEPENS MULTIPLE CIRCUIT SPLITS.

Respondents do not dispute that the Fourth Circuit's decision accelerates an alarming trend in the lower courts of declaring cross-shaped memorials categorically unconstitutional. On the contrary, respondents embrace that result: They crow that "*[e]very* federal case involving the constitutionality of a government cross monument displayed as a memorial found the cross unconstitutional." Opp. 20.

In fact, respondents and their allies have not had such total success—yet. Multiple circuits have properly rejected the categorical hostility to cross memorials displayed by the Fourth, Ninth, and Tenth Circuits, along with the misguided interpretations of the Establishment Clause that led to that

conclusion. Pet. 21-32. This Court's intervention is urgently needed to resolve these divisions of authority before more circuits join the abolitionist camp.

1. At least three Circuits—the Ninth, the Tenth, and the Fourth—have adopted a virtual "presumption of unconstitutionality" for cross-shaped memorials. *Am. Atheists, Inc.* v. *Davenport*, 637 F.3d 1095, 1102-03 (Kelly, J., dissenting from denial of rehearing). Respondents suggest that these cases turned on "extensive analysis" of the particulars of each monument. Opp. 24. But the centerpiece of each court's opinion was that the Latin cross, even when used commemoratively, sends an unavoidably religious message. Pet. 27-28. The "extensive analysis" respondents describe consisted of those courts systematically rejecting every secularizing factor as insufficient to overcome that supposedly sectarian meaning. *See Davenport*, 637 F.3d at 1121-24; *Trunk* v. *City of San Diego*, 629 F.3d 1109, 1117-25 (9th Cir. 2011); Pet. App. 22a-29a.[1]

The Second and Fifth Circuits, in contrast, have rejected this unyielding position. Pet. 25-27. Respondents assert that the cross-shaped memorials upheld by those Circuits are distinguishable because they had "the principal or primary effect of" celebrat-

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[1] The Commission agrees with the American Legion that *Weinbaum* v. *City of Las Cruces*, 541 F.3d 1017 (10th Cir. 2008), correctly upheld the use of a cross as a historical insignia. *See* Pet. 28 n.3. In *Davenport*, however, the Tenth Circuit limited *Weinbaum* to its unique facts, and held—based on sweeping reasoning cited approvingly by the panel below, *see* Pet. App. 26a—that the cross cannot serve "as a secular symbol of death." 637 F.3d at 1120, 1122.

ing a historical figure and honoring the victims of 9/11. Opp. 22. That is question-begging in the extreme. The cross memorials invalidated by the Fourth, Ninth, and Tenth Circuits had comparable commemorative purposes: to celebrate the war dead or fallen highway troopers. The only difference is that the Second and Fifth Circuits were willing to accept that the cross can predominantly convey a secular commemorative message, while the Fourth, Ninth, and Tenth Circuits were not.[2]

2. The Circuits' split on this question stems in significant part from a further split as to what knowledge to attribute to the "reasonable observer." Pet. 29-30. Whereas some Circuits correctly understand the reasonable observer as an idealized personification of the community, others view him as an imperfectly informed passerby who fails to notice crucial secularizing details. *Id.*; *see Davenport*, 637 F.3d at 1108 (Gorsuch, J., dissenting from denial of rehearing). Respondents' only rejoinder is that all Circuits take into account a monument's "size, prom-

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[2] Contrary to respondents' suggestion, the Third, Seventh, and Eleventh Circuits have not joined their side of the split. Each of the cases respondents cite invalidated crosses used for plainly religious ends, such as celebrating Christmas or Easter, *ACLU of Illinois* v. *City of St. Charles*, 794 F.2d 265, 273 (7th Cir. 1986); *ACLU of Georgia* v. *Rabun Cty. Chamber of Commerce, Inc.*, 698 F.2d 1098, 1101 (11th Cir. 1983) (per curiam), supporting a religious denomination, *Harris* v. *City of Zion*, 927 F.2d 1401, 1404 (7th Cir. 1991), or serving as part of a platform for the Pope to say mass, *Gilfillan v. City of Philadelphia*, 637 F.2d 924, 929 (3d Cir. 1980). Several district court cases that respondents cite are similarly distinguishable. *See, e.g.*, *Cabral* v. *City of Evansville*, 958 F. Supp. 2d 1018 (S.D. Ind. 2013) (striking down public display of church crosses).

inence, and visibility." Opp. 27. That is a non-sequitur. The point is that the Fourth and Tenth Circuits are alone in concluding that they may *ignore* critical facts that might escape the notice of a speeding motorist, such as a large plaque explicitly announcing the monument's secular purpose. Pet. App. 24a-26a; *Davenport*, 637 F.3d at 1121.

3. The Circuits' division also rests on a split as to what if any weight to place on a monument's longevity. Pet. 31. Respondents suggest that Circuits have found this factor relevant only in cases involving the Ten Commandments. Opp. 28. That is plainly false, *see* Pet. 31 (giving examples), and in any event would make no sense; there is no special branch of "Ten Commandments Law," *Utah Highway Patrol Ass'n* v. *Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari) (citation omitted)). Nor is there merit to respondents' speculation that the Ninth and Fourth Circuits rejected reliance on a monument's longevity only because they found a "climate of intimidation." Opp. 29. Those courts categorically refused to credit this aspect of Justice Breyer's concurrence on the ground that it was "too simplistic," Pet. App. 23a-24a, and had "no traction," *Trunk*, 629 F.3d at 1122.

III. THIS CASE IS PROFOUNDLY IMPORTANT.

The importance of this case is clear. As numerous amici have affirmed, removing or dismembering the Peace Cross would have profound implications: It would tear out a unifying centerpiece of the local community, Amicus Br. of Maryland Elected Officials 4-5; denigrate the sacrifices of veterans and the fallen, Amicus Br. of Military Order of the Purple

Heart 15-16; and threaten countless similar memorials throughout the Fourth Circuit and the country more broadly, Amicus Br. of West Virginia *et al.* 12-27 (cataloguing numerous similar monuments); Amicus Br. of U.S. Senators and Representatives 8-24 (same).

Respondents claim that the Commission has expressed indifference as to whether the Peace Cross crumbles. Opp. 11-14. That is an absurd mischaracterization. The snippets of documents that respondents quote were part of a committed effort to *ensure the memorial's preservation*. *See* C.A. JA 1571-1616 (expert report designed to establish basis for efforts to "stabilize/preserve/restore the monument"); *id.* at 1620-46 (soliciting proposals to restore monument).

Respondents further suggest that the Fourth Circuit's decision will not threaten similar memorials at Arlington National Cemetery and elsewhere. But respondents do not offer any remotely persuasive distinction that would save these monuments if the Peace Cross falls. The best they can muster is that other monuments might have more "walkways" than the Peace Cross, be further from a "highway intersection," or contain "ethnic markers"—distinctions as flimsy as they come. Opp. 17-19. In the end, respondents simply ask the Court to trust that respondents and similar organizations would find it "imprudent * * * to challenge the Arlington crosses." Opp. 18. That is frigid comfort indeed, given many organizations' determined crusade to uproot cross-shaped memorials throughout the country, no matter how cherished or longstanding. *See* Pet. 21-27; Opp. 20.

IV. RESPONDENTS' "RIPENESS" ARGUMENT IS MERITLESS.

In a last-ditch attempt to avoid review, respondents claim that this case is not "ripe" because the lower courts have not yet issued a remedial order. Opp. 1. To the extent respondents are claiming this Court lacks jurisdiction, their objection is meritless. The Court has "unquestioned jurisdiction" to review decisions before issuance of a remedy. Stephen M. Shapiro *et al.*, Supreme Court Practice § 4:18 (10th ed. 2013).

Nor is there any prudential reason for this Court to wait. The Fourth Circuit's decision is plainly incorrect. And the severe and unacceptable consequences of its holding—including the present threat to similar monuments throughout the Fourth Circuit—will materialize irrespective of the precise shape of the remedy in this case. *Cf. Mazurek* v. *Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) (finding interlocutory review and summary reversal proper because "the Court of Appeals' decision [wa]s clearly erroneous" and "created a real threat of [harmful] consequences for * * * six other States in the Ninth Circuit").

Furthermore, there is no prospect that the lower courts will order an acceptable remedy. Respondents have insisted throughout the litigation that the monument must be "remove[d]," "demolish[ed]," or dismembered and converted into "a non-religious slab." C.A. JA 131. The Fourth Circuit proposed the same "arrangements." Pet. App. 31a-32a n.19. Given the Fourth Circuit's categorical objection to the display of a "40-foot tall Latin cross," *id.* at 5a, and its dismissal of the already pervasive indicia of

the monument's secular meaning, *id.* at 20a-29a, it is clear that no lesser remedy would satisfy it. Furthermore, any attempt to transfer the Peace Cross to a private entity would pose exceptional challenges, given the "obvious" and "significant" "public safety risks" inherent in permitting a private entity to maintain an aging monument on a busy highway median. Amicus Br. of State of Maryland 5-6; *see* Opp. 11 (acknowledging safety concerns). Indeed, the Executive Director of the American Humanist Association explained that this case was "very attractive" to the organization precisely because "unlike many recent cross cases, the opponent will have great difficulty selling the land *** because the 40 foot cross is in the median of a public highway." C.A. JA 3046.

The posture of this case is therefore unlike *Trunk*. In *Trunk*, it was "unclear precisely what action the [government would] be required to take," and there was some prospect that the memorial at issue could "'be modified to pass constitutional muster.'" *Mount Soledad Mem'l Ass'n* v. *Trunk*, 132 S. Ct. 2535, 2536 (2012) (statement of Alito, J., respecting denial of certiorari). In retrospect, even that hope was overly optimistic: On remand, the district court concluded that the Ninth Circuit's "deliberate language *** ma[de] it clear that removal of the large, historic cross is the *only* remedy that *** will cure the constitutional violation" it found. *Trunk* v. *City of San Diego*, 2013 WL 6528884, at *1-2 (S.D. Cal. Dec. 12, 2013) (emphasis added). Only the timely enactment of a federal statute directing that the memorial be transferred to a private entity saved it from destruction. Pub. L. No. 113-291, § 2852 (2014).

Here, the Fourth Circuit's language is at least as categorical as the Ninth Circuit's. And it is all the clearer that no half-measure would be likely to address the Fourth Circuit's concerns. Unless this Court intervenes, the Peace Cross, and numerous memorials like it, will be removed from the Nation's landscape, and their honorees erased from the Nation's memory.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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